APPENDIX.

Federal Employers' Liability Act Now in Force.

The act whose validity is drawn in question (35 Stat. at L. 65, Chap. 149 U. S. Comp. Stat. Supp. 1909, p. 1171), and the Amendment of April 5, 1910 (36 Stat. at L. 291, Chap. 143), are as follows:

An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for any such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal zone, or other possessions of the United States, shall be liable in damages to any person suffering in-

jury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: Provided, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

Sec. 5. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed, or paid to any insurance, relief, benefit or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Sec. 7. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employes under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled, "An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employes," approved June eleventh, nineteen hundred and six (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1909, p. 1148).

Approved April 22, 1908.

An Act to Amend an Act entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That an Act entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Sec. 2. That said Act be further amended by adding the following section as section nine of said Act:

"Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe; but in such cases there shall be only one recovery for the same injury."

Approved April 5, 1910.

First Federal Employers' Liability Act Declared Unconstitutional.

The first Act of Congress, known as a Federal Employers' Act, was approved June 11, 1906 (32 Stat. 232), and provided (Section 1) in part as follows:

> "That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states * * * shall be liable to any of its employes * * * for all damages which may result from the negligence of any of its officers, agents or employes, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or works."

Office Supreme Court, U. S.
FILED
AUG 16 1926
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
vs.
MARY I. AEBY,
Respondent.

No. [redacted]

SUGGESTIONS IN OPPOSITION TO WRIT OF CERTIORARI.

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SUGGESTIONS IN OPPOSITION TO WRIT OF CERTIORARI.

The opinion of the Supreme Court of the State of Missouri filed in this case states the facts so fully and states the applicable law so clearly, cogently and unequivocally that we believe that a reading of the opinion will demonstrate at once that the present petition is based upon a misconception of the pleadings and evidence in the case and a misinterpretation of the rulings of the Supreme Court of the State of Missouri. It is our purpose in submitting the following brief suggestions in opposition to the issuance of a writ of certiorari, merely to direct the

attention of the Court to the portions of the record which demonstrate the errors which underlie petitioner's application for the writ.

I.

The first point raised by petitioner is that the pleadings and proof do not show a case falling within the provisions of the Federal Employers' Liability Act, and that respondent's remedy, if any, is at common law.

This argument comes with a certain amount of lack of good grace on the part of petitioner. This suit was originally brought as an action at common law. Petitioner joined issue by filing an answer in the nature of a general denial. Shortly before the date set for the trial of the case petitioner filed an amended answer, alleging, among other things, that at the time of respondent's injury petitioner was engaged in interstate commerce and respondent was employed by petitioner in interstate commerce and pleading the defense of assumption of risk as enunciated in the decisions of the federal courts construing the Federal Employers' Liability Act. Respondent was thus placed in a position of being compelled to elect to proceed either at common law or under the Federal Employers' Liability Act, an unenviable position. In attempting to avoid Scylla respondent must face Charybdis. If respondent proceeded under the common law, petitioner would contend that the Federal Employers' Liability Act applied and that respondent was not entitled to recover at common law; if respondent proceeded under the Federal Act petitioner would contend, as it now contends, that the action should be at common law. After a careful consideration of the facts and the applicable authorities, counsel for respondent concluded that the case fell within the purview of the Federal Employers' Lia-

bility Act and filed an amended pleading (designated an "amended petition" under the Missouri practice) designed to set up a cause of action under the Federal Employers' Liability Act (Rec., p. 6).

Petitioner joined issue by filing an answer admitting that petitioner was at all times mentioned in respondent's amended petition engaged in interstate commerce, and admitting that "at all such times, **as well as at the time of her alleged injury,**" respondent was employed by petitioner in interstate commerce, to wit, as a station agent at Magness, Arkansas, and admitting that the particular train mentioned in respondent's petition to which respondent **"was required to deliver and from which she was required to receive** express, mail and baggage" was an interstate commerce train (Rec., p. 10). In the third paragraph of its answer petitioner again admits that it was engaged in interstate commerce, and that at all times mentioned in respondent's amended petition, **"as well as at the time of her alleged injury,"** respondent was employed by petitioner in interstate commerce (Rec., p. 11). Under the Missouri practice this admission dispensed with the necessity of proof that respondent was engaged in interstate commerce at the time she was injured (State v. Adler, 97 Mo. 413).

No contention was made in the trial court that the common law applied, as is shown by the record of the proceedings in the trial court, but the trial proceeded and instructions were offered by both parties and were given by the Court on the theory that the Federal Employers' Liability Act applied. The point that the common law applied and not the Federal Employers' Liability Act was raised for the first time on appeal to the Supreme Court of the State of Missouri. But even there no con-

tention was made that respondent was not employed in interstate commerce at the time of her alleged injury.

In this court, **for the first time**, petitioner raises the point that respondent at the time of her alleged injuries was not employed in interstate commerce, but was walking back across the platform, "**presumably** for her own convenience, and while she was not performing any act of service," and proceeds to base its argument upon this assertion of fact. It is apparent that the position of petitioner at this time and in this Court is contrary to the solemn admission which it made in the answer filed in the Circuit Court of the City of St. Louis, Missouri, in which it specifically admitted that at the time of her alleged injuries respondent was employed in interstate commerce. It is contrary to the position taken by petitioner at the trial of the case in requesting the Court to give and having the Court give its instructions Nos. 3, 4 and 5 (Rec., pp. 138 to 140). It is contrary to the position taken by petitioner in the Supreme Court of Missouri, as is shown by the quotation of the Court from the brief filed by petitioner in that court (Rec., p. 163). And, finally, it is an assertion unfounded upon any testimony in the case and conclusively decided against petitioner by the verdict of the jury. As stated in the opinion of the Supreme Court of the State of Missouri (Rec., p. 159), respondent testified that she was returning to the station after having moved the truck across the station platform and placed it in position to receive baggage, express and mail from train No. 214, which was due at the station in a few minutes and which petitioner admits was an interstate commerce train (Rec., p. 23). It is true that after petitioner was injured she was unable to go to the truck to remove the express, mail and baggage placed upon it from train No.

214, but this in no wise militates from the fact that at the time she received her injuries she was engaged in interstate commerce. There is not a single iota of testimony in the entire record that respondent was walking across the platform or doing anything else for her own convenience, either "presumably" or otherwise. The jury, under instruction No. 1, was required to find, and did find, that it was plaintiff's duty to pass over and along the platform in question to receive express, mail and other things from passing trains and to place a truck in position for the receipt of same, and the jury was required to find and did find that respondent fell and was injured while in the course of her employment (Rec., pp. 136, 137).

Certainly a litigant, in appealing to the conscience of a Court and asking for the issuance of a discretionary writ, should not be permitted to take a position based upon an assertion of the supposed existence of a state of facts which is contrary to its solemn admission in open court, contrary to its position taken at the trial of the case and contrary to the position taken on appeal and accordingly we believe that this Court might well disregard the whole of petitioner's argument, based as it is upon a set of facts which does not exist.

This Court, in all of its decisions, has taken the position that where a servant is injured while a railroad is engaged in interstate commerce and the servant is employed in interstate commerce the Federal Employers' Liability Act applies, and, under the admissions of petitioner in this case and the applicable decisions of this Court, petitioner's argument that the case does not fall within the act is utterly groundless (Pederson v. Delaware etc. R. R., 229 U. S. 146; Second Employers' Liability Cases, 223 U. S. 1; Missouri etc. Ry. Co. v. Wulf, 226 U. S. 570; Industrial Accident Commission v. Davis, 259 U. S. 182). The

case of Elliott v. Payne, 293 Mo. 581, contains no contrary holding, but, as pointed out in the opinion of the Supreme Court of Missouri in this case (Rec., p. 163), it merely holds that a station platform is not ordinarily the working place of a locomotive fireman, and that a locomotive fireman who steps from his engine for a purpose not shown to have been in the course of his employment cannot claim that the station platform is his working place so as to come within the terms "cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs or other equipment," as used in the Federal Employers' Liability Act. This is shown by a reading of the headnotes to the case as prepared by the Court. Moreover, the Missouri Supreme Court, by way of dictum, stated that a station platform was the working place of an employe who was required to deliver and receive express, mail and baggage from trains, and this dictum was followed by the Missouri Supreme Court in the present case. There are numerous cases of this Court in which certiorari has been refused under similar circumstances, and there are numerous decisions of this Court holding that the Federal Employers' Liability Act is applicable under circumstances such as exist in this case. (See Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169, affirming Baltimore & Ohio R. R. Co. v. Whitacre, 142 Md. 411, 92 Atl. 1002; Seaboard Air Line Ry. Co. v. Renn, 241 U. S. 290, affirming Renn v. Seaboard Air Line Ry. Co., 170 N. C. 128, 86 S. E. 964; Baltimore & Ohio R. R. Co. v. Fletchner, 200 Fed. 318, certiorari denied, 266 U. S. 613; Baltimore & Ohio R. R. Co. v. Kast, 200 Fed. 419, certiorari denied, 266 U. S. 613; Davis v. Scroggins, 284 Fed. 760, writ of error dismissed, 262 U. S. 734.)

Unless this Court is to undertake the burden of reviewing every case decided by a state court in which an em-

ployé is injured while the master is engaged in interstate commerce and the servant is employed in interstate commerce, merely because the carrier raises the issue that the instrumentality which causes the injury is not one included within the terms of the federal act, then certiorari should be refused in this case. There is no question of substance heretofore undecided, and there is no great public interest to appeal to the discretion of this Court, but we have a case of a petitioner reversing its position and, in the face of its own solemn admission, asking for a writ and appealing to the discretion of the Court on a fictitious state of facts.

II.

The second point raised by petitioner is that the Supreme Court of the State of Missouri erred in applying the law as to the doctrine of assumption of risk.

In order to support this contention petitioner asserts, on page 13 of its petition and on pages 19 and 21 of its brief in support of its petition for a writ of certiorari, that the Supreme Court of Missouri, instead of applying the federal doctrine of assumption of risk, applied the state law applicable in cases not falling within the federal act, and quotes an isolated portion of the opinion of the Court in support of such contention. A simple reading of the record and of the opinion of the Supreme Court of Missouri will demonstrate to this Court that petitioner is seeking to charge the Supreme Court of Missouri with an error which was never committed. This case was tried below and all the instructions were given under the federal doctrine of assumption of risk. As pointed out by the Supreme Court of Missouri, the instructions, in many respects, were too favorable to petitioner (Rec., p. 165).

The Supreme Court of Missouri pointed out that petitioner was negligent in the construction and maintenance of its platform, and that accordingly there was no state doctrine under which respondent would be charged with having assumed the risk of injury. It then proceeded to examine the pleadings and evidence in the case in the light of the federal rule of assumption of risk, quoting from Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, the leading case decided by this Court on that question, and concluded that no grounds existed for disturbing the finding of the jury.

On page 21 of its brief in support of its petition, petitioner states that the Supreme Court of Missouri falls into the same error which resulted in the issuance of a writ of certiorari in the case of Pryor v. Williams, 254 U. S. 43. In the Pryor case the trial court refused to instruct on the doctrine of assumption of risk, and the Supreme Court of Missouri held that the question of assumption of risk was to be determined by the state law in cases where the federal act was not involved. In the present case the instructions were given in the trial court, and the case was reviewed on appeal under the federal rule. Accordingly, it is apparent that this case is in no respect similar to the case of Pryor v. Williams, and that petitioner, for the purpose of appealing to the discretion of this Court, is attempting to twist the opinion of the Supreme Court of Missouri and to give it an interpretation to which it is not susceptible.

A second phase of petitioners' argument apparently takes the position that even though the Supreme Court of Missouri applied the federal doctrine of assumption of risk it erred in not holding that as a matter of law respondent assumed the risk. At no place, either in its

petition or argument, does petitioner so state, but we glean from the confused jumble of statement of supposed facts and argument that some such contention is intended to be made. A reading of either the record in this case or the opinion of the Supreme Court of Missouri will demonstrate to this Court at once that the argument of petitioner in this respect is based upon a misconception of the facts and will demonstrate to this Court that the facts stated in petitioner's petition and brief and which petitioner claims to be the testimony of respondent herself are neither a complete statement nor an accurate statement of the evidence in the case.

The statement of petitioner in this respect is so inaccurate that we ask the indulgence of the Court in setting forth the testimony at some length. The station platform in question was dry when respondent retired on the night of January 12, 1921, and the exact hour at which it began to rain was unknown to respondent (Rec., p. 38). When respondent arose the next morning it was dark and the steps and station platform were covered with two or three inches of snow (Rec., p. 24). Respondent testified that she had no knowledge that there was ice in the depression in front of the station door (Rec., p. 54). It was dark and the ice was covered with snow (Rec., p. 27). It is true that respondent knew of the existence of the depression in front of the station door, and it is true that respondent knew that rain had previously collected in this depression, but the record shows that the chat which composed the station platform absorbed rain (Rec., p. 22) and unless respondent knew of the volume and duration of the rain she could not be charged with knowledge of its collection in the depression on this particular occasion. So is pointed out by the Supreme Court of Missouri in

its opinion (Rec., p. 158), there had been no freezing weather at Magness from the time respondent became station agent until this accident occurred (Rec., p. 20), and, of course, respondent had no actual knowledge that ice had ever formed in the depression or of the characteristics of the ice which did form. **The ice which formed in the depression was rough and uneven and presented an irregular surface** (Rec., pp. 46, 48 and 74). **The record shows conclusively that respondent was injured by tripping on a ridge in this rough, uneven ice** (Rec., pp. 46, 48). Certainly, under these circumstances, it cannot be said, as a matter of law, that the defect was so plain that an ordinarily prudent person was bound to observe it, and surely it cannot be said that the risk arising from the defect was so plainly observable that an ordinarily prudent person would have appreciated it. In the case of Seaboard Air Line Railway Co. v. Renn, 241 U. S. 290, affirming Renn v. Seaboard Air Line Railway, 170 N. C. 128, 86 S. E. 964, it was held that under similar circumstances an employe did not assume the risk of slipping and falling. There are numerous cases under the Federal Employers' Liability Act to the same effect. See

Cincinnati Railroad Co. v. Thompson, 236 Fed. 1;
Burdick v. Chicago etc. Railway Co., 123 Minn. 105, 143 N. W. 115;
Rogers v. Davis, 228 Pac. 339 (Idaho);
York v. Chicago etc. Railway Co., 184 Wis. 110, 198 N. W. 377;
Fitzgerald v. Great Northern Ry. Co., 157 Minn. 412, 196 N. W. 657.

And see also:

Bowen v. Wormsbo Mfg. Co., 105 Me. 31, 72 Atl. 685;
Fitzgerald v. Conn. River Paper Co., 155 Mass. 155, 29 N. E., l. c. 467.

Not a single case is cited by petitioner in which the facts are in any respect similar to the facts in this case. Moreover, it is the established rule of this Court that it will not disturb the concurrent findings of state trial and appellate courts on an issue of fact in the absence of some palpable error (Great Northern Ry. Co. v. Knapp, 240 U. S. 464; Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169), and in view of this rule surely no basis exists for the issuance of a writ of certiorari.

III.

The final ground on which petitioner seeks a writ of certiorari is that respondent's own negligence was the sole cause of her injury.

As is pointed out by the Supreme Court of Missouri (Rec., pp. 159 and 164), respondent had nothing to do with the suggestion of or the making of repairs in or about the station or platform. The evidence on this point was all one way. Petitioner's own witnesses testified that it was the duty of the section men under the section foreman to make repairs of the station platform (Rec., p. 118). It was the duty of the section foreman to come around once a day observing the condition of things at the station (Rec., p. 118). Petitioner's division superintendent testified that he passed through Magness approximately every ten days on inspection trips (Rec., p. 92). He had under him a supervisor of bridges and buildings who had charge of the repair work and maintenance of stations (Rec., p. 93). It accordingly is apparent that it was not the negligence of respondent which caused the defect in the platform which led to the accumulation of the ice upon which respondent tripped and fell. Accordingly, even if it be assumed that respondent was

negligent in the manner in which she walked across the platform, which was by no means established, it would amount to mere contributory negligence which could be considered only in mitigation of damages. As is pointed out by the Supreme Court of Missouri (Rec., p. 169), this was the position taken by petitioner in offering and requesting the trial court to give instruction No. 5 and this is the position to which petitioner must be held on an appeal and in applying for a writ of certiorari in this court. None of the cases relied upon by petitioner present a situation in anywise analogous to the situation presented by the record in this case and afford no basis for the issuance of the writ prayed for.

We accordingly respectfully submit that the writ of certiorari should be denied.

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